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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

SHARON HOGAN, Plaintiff and Respondent, v. NORDSTROM, INC., Defendant and Appellant.	A113160 (San Francisco County Super. Ct. No. CGC-05-443680)

Defendant Nordstrom, Inc. appeals from an order denying its motion to compel arbitration of plaintiff Sharon Hogan's disability discrimination claim under the Fair Employment and Housing Act (FEHA). The issues are whether the parties' arbitration agreement is unconscionable, and whether the agreement satisfies the requirements for arbitration of FEHA claims. Because the arbitration agreement is not substantively unconscionable, we find no grounds to deny enforcement of the agreement, and reverse the order denying the motion to compel arbitration.

I. BACKGROUND

Hogan's declaration in opposition to the motion to compel states that she worked for Nordstrom from 1991 to December 2003, when she was hit and injured by an automobile. On May 7, 2004, she was released by her physician to return to work with restrictions, but Nordstrom refused her request to do so. In July 2004, her counsel wrote Nordstrom requesting accommodations to enable her to return to work, and that request was also refused. In August 2004, she filed disability discrimination charges against

Nordstrom with the Equal Employment Opportunity Commission and the Department of Fair Employment and Housing, and received right-to-sue notices from both agencies. She returned to work at Nordstrom in early September 2004.

Hogan's declaration continued: "[¶] 7. When I returned to work for Nordstrom, I was told that I was required to attend a meeting on September 9, 2004. [¶] 8. On September 9, 2004, I attended a one hour meeting and received information regarding the Nordstrom's Dispute Resolution ("NDR") program. [¶] 9. Over two-hundred employees were present at the meeting, which was given by Nordstrom management. [¶] 10. When one employee attempted to ask a question, she was told that no questions would be answered during that meeting. [¶] 11. At the conclusion of the meeting, I was told to sign the [NDR] Program Employee Acknowledgement Form. [¶] 12. When I signed the NDR Acknowledgement Form, I did not believe that the NDR applied to my claims against Nordstrom. [¶] 13. At the time of signing the NDR Acknowledgement Form, I felt that I had to sign the agreement or my job would be in jeopardy as I had just been returned to work."

The form Hogan signed acknowledged that she had received a copy of the NDR Program booklet stating that any "covered claim" would be resolved through arbitration, and that the program would become effective on December 1, 2004. Covered claims listed in the NDR include those of disability discrimination. The NDR states in part: "You must use the Nordstrom Dispute Resolution Program instead of a court proceeding, including a jury trial, to resolve covered claims against Nordstrom, its officers, directors, shareholders, employees, or others in their personal or official capacity that arise from or are in any way connected with your current or future employment. Likewise, Nordstrom must also use the Dispute Resolution Program instead of a court proceeding to resolve covered claims against you that arise from or are in any way connected with your current or future employment."

May Choi, Nordstrom's Human Resources Manager at the San Francisco Centre store where Hogan worked, states in her declaration that, "[t]o [her] knowledge, Nordstrom has never terminated or disciplined anyone for not signing or returning the

Acknowledgement Form. If Plaintiff had chosen not to sign the agreement, she would have remained employed with the Company."

Hogan filed her complaint herein for disability discrimination under the FEHA in August 2005. She opposed Nordstrom's motion to compel arbitration on the grounds that the NDR was procedurally and substantively unconscionable, and that it failed to meet the minimum requirements set forth in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*) for arbitration of unwaivable statutory employment claims.

In its briefing and at the hearing on the motion, Nordstrom raised evidentiary objections to paragraphs 11, 12, and 13 of Hogan's declaration. The court declined to rule on the objections, and entered an order denying the motion without any elaboration of reasons for the ruling.

II. DISCUSSION

A. Arbitrability

We begin with the assumption that the NDR, which is limited to claims arising from or connected with "current or future" employment, could nonetheless be interpreted to require arbitration of claims like that of Hogan, which involved events that concluded months before the agreement became effective. The NDR provides that, "[i]f necessary, the arbitrator will determine whether any particular claim or person is subject to the [NDR] Program." Thus, while Hogan denies that her discrimination claim is covered by the NDR, she concedes that issue is for the arbitrator, rather than the court, to determine. (See Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2006) [¶] 18:488 et seq., pp. 18-51 to 18-52 (rev. #1 2006) and authorities cited [courts defer to clear and unmistakable provision empowering arbitrator to decide which matters are arbitrable].)

B. Unconscionability

(1) Elements of Unconscionability

Hogan contends that her discrimination claim should not be referred to arbitration because the NDR is unconscionable as applied to that claim. " '[U]nconscionability has

both a "procedural" and a "substantive" element . . .' " and "[b]oth procedural and substantive unconscionability must be present to deny enforcement to the contract . . . ." (*Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal.App.4th 708, 722-723 (*Fittante*).) Issues of unconscionability have arisen frequently in connection with employment arbitration agreements. (See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 336, pp. 377-380 and cases cited.)

" '. . . The procedural element focuses on two factors: "oppression" and "surprise." [Citations.] "Oppression" arises from an inequality of bargaining power which results in no real negotiation and "an absence of meaningful choice." [Citations.] "Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. [Citations.]' The substantive prong of unconscionability encompasses ' "overly harsh" or "one-sided" results.' " (*Fittante, supra,* 105 Cal.App.4th at pp. 722-723, fns. omitted.) " 'Substantive unconscionability' focuses on the terms of the agreement and whether those terms are 'so one-sided as to "shock the conscience." ' " (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1330 (*Kinney*).) " 'In assessing substantive unconscionability, the paramount consideration is mutuality.' " (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1287; see also *Armendariz, supra,* 24 Cal.4th at p. 117 [" 'modicum of bilaterality' " is needed in an arbitration agreement].)

(2) Whether the NDR is Substantively Unconscionable

We first examine the issue of substantive unconscionability. Since this issue turns primarily on the language of the NDR, and no conflicting extrinsic evidence, disputed facts, or disputable inferences from the facts are involved, the trial court's implied finding of substantive unconscionability is subject to our de novo review. (Compare *Balandran v. Labor Ready, Inc.* (2004) 124 Cal.App.4th 1522, 1527 [review is de novo where arbitration agreement is construed without conflicting extrinsic evidence]; with *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 89 [review is for substantial evidence if unconscionability finding is based on conflicting evidence].)

(a) Pre-Existing Claims

Hogan submits that the NDR is unconscionable insofar as it may extend to pre-existing claims. She acknowledges that the NDR is facially even-handed in requiring Nordstrom and the employee to submit covered claims to arbitration, but argues that the obligation to arbitrate is not truly bilateral as to pre-existing claims because Nordstrom has the power to decide whether to require the employee to enter into the NDR, and thus to dictate which pre-existing claims are arbitrated.

This argument is unpersuasive, even if it is assumed that the NDR was a contract of adhesion, i.e., a standardized contract drafted by the stronger party and presented to the weaker party on a take it or leave it basis (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213). Hogan posits a situation where the employer imposes the obligation to arbitrate in order to obtain a tactical advantage over the employee (see generally *Armendariz, supra,* 24 Cal.4th at pp. 119-120 [whether party wishes to arbitrate may vary depending on the circumstances because arbitrators may tend to " 'split the difference,' " and " '[c]lear-cut victory' " may be more likely in court]), but there is no evidence of any such intent here. Insofar as it appears from the evidence, Nordstrom was requiring all of its hundreds of employees to subscribe to the NDR. Hogan was not singled out for special adverse treatment, and there is no likelihood that Nordstrom adopted the NDR out of concern for her particular case. Nor did Nordstrom make the NDR immediately effective; it gave those like Hogan with pre-existing claims a window of time within which to file them in court if they so desired. Hogan already had counsel. Thus, while there might be situations where it would be substantively unconscionable to require arbitration of pre-existing claims, this is not one of them.

(b) Discovery

The next allegedly unconscionable aspect of the NDR stems from a provision notifying the employee that he or she is responsible for paying "[a]ny costs to produce evidence you request, including, but not limited to, deposition costs or discovery requests." Hogan notes that the NDR is not facially bilateral on this subject because it does not specify who pays for production of evidence Nordstrom requests, but the

absence of such a provision cannot reasonably be taken to imply that the employee is expected to cover the costs of discovery requested by Nordstrom. (See *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1136, fn. 30 (*Lagatree*) ["an arbitration agreement that is silent on an issue . . . can be interpreted in favor of the employee"].) The NDR states that "[t]he discovery process will be conducted in accordance with the National Rules for the Resolution of Employment Disputes, as published by the AAA [American Arbitration Association]." Those rules delegate authority over discovery matters and allocation of costs to the arbitrator, and there is no reason to believe the arbitrator would improperly "require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court." (*Armendariz, supra*, 24 Cal.4th at pp. 110-111; see also *id.* at p. 106 [approving arbitrator's authority in discovery matters].)

Since the employer "is presumably in possession of the vast majority of evidence that would be relevant to employment-related claims against it" (*Kinney, supra*, 70 Cal.App.4th at p. 1332), Hogan believes "a requirement that the employee bear the employer's cost of producing that evidence could easily impair the employee's ability to pursue the claim." However, the NDR merely and permissibly requires the employee to bear the same discovery costs he or she may incur in a court action. (See Code Civ. Proc., §§ 1033.5, subd. (a)(3) [depositions]; 2031.280 [documents].)

(c) Attorney's Fees

The other allegedly unconscionable facet of the NDR is its provision for payment of attorneys' fees if a court action is instituted over a covered claim. The NDR advises that: "[i]f you use a method other than arbitration to attempt to resolve a covered claim, such as filing a lawsuit in court, the arbitrator may require you to pay reasonable attorneys' fees or other expenses that Nordstrom incurs in resolving the situation and obtaining dismissal of your actions. Likewise, Nordstrom can be assessed reasonable attorneys' fees if the Company fails to use arbitration for resolving a covered claim."

Hogan concedes that these fee provisions are bilateral, but contends that the potential fee liability "will be much more daunting to an employee than it would to a

national retailer like Nordstrom," and will impermissibly chill employee challenges to the NDR. However, it is sufficient that both sides are equally exposed to the same liability for breach of the agreement. No authority suggests that a neutral fee provision can be deemed unconscionable merely because it is of relatively greater consequence to the party with lesser financial resources.

(d) Conclusion

For the foregoing reasons, the NDR is not substantively unconscionable. In view of that holding, we need not address any issues of procedural unconscionability.[1] (See, e.g., *Fittante*, *supra*, 105 Cal.App.4th at pp. 721, 723 [although employment arbitration agreement was contract of adhesion and procedurally unconscionable, most provisions were enforceable because they were not substantively unconscionable].)

C. Requirements for Arbitration of FEHA Claims

Under *Armendariz*, *supra*, 24 Cal.4th at page 102, an agreement for mandatory arbitration of claims involving unwaivable statutory rights such as those under the FEHA is lawful if it " '(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.' . . ."

Hogan contends that the discovery cost provision discussed above violates the second and fifth of the foregoing requirements, but, as we have explained, that provision does not require employees to pay unreasonable costs. Nor does the discovery cost provision allow for only "minimal discovery" in an NDR arbitration. There are no limitations on discovery under the NDR other than those the arbitrator may impose, and

[1] We also need not resolve the arguments over the proper scope of review of implied factual findings based on conflicting evidence, or over the admissibility of statements in Hogan's declaration, because those issues pertain entirely to the question of procedural unconscionability.

"AAA rules governing discovery [in employment disputes] are fair to claimants." (*Lagatree, supra,* 74 Cal.App.4th at p. 1130, fn. 21.)

Hogan argues that the NDR does not provide for neutral arbitrators because it limits the pool of arbitrators to members of the AAA, which Hogan describes as "an arbitral forum in which Nordstrom is a 'repeat player.' " However, no evidence refutes the NDR's representation that "AAA can call upon thousands of arbitrators to serve as employment-dispute arbitrators" and, even where relatively few arbitrators are available for appointment under an employment arbitration agreement, courts "are not prepared to say without more evidence the 'repeat player effect' is enough to render an arbitration agreement unconscionable." (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 178-179.)

III. DISPOSITION

The order denying the motion to compel arbitration is reversed with directions to grant the motion.

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Marchiano, P.J.

We concur:

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Stein, J.

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Margulies, J.